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No. 97-322

FILED
OCT 22 1997
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1997

KAREN F. ALEXANDER
Petitioner,

- against -

CHRISTINE TODD WHITMAN; et al.
Respondents.

ON PETITION FOR WRIT OF CERTIORARI

REPLY BRIEF OF PETITIONER KAREN F. ALEXANDER

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LEGAL ARGUMENT

I. RESPONDENTS' ARGUMENT IN SUPPORT OF NEW JERSEY'S DISCRIMINATION AGAINST KAREN ALEXANDER IS REALLY ONLY AN ARGUMENT AGAINST THIS COURT'S HOLDINGS IN *LEVY*, *GLONA* AND *WEBER*.

The Brief in Opposition advances arguments in defense of New Jersey's discrimination against Karen Alexander which are, in essence, arguments against the holdings of this Court in *Levy v. Louisiana*, 391 U.S. 68 (1968), *Glona v. Amer. Guar.*, 391 U.S. 73 (1968), and *Weber v. Aetna*, 406 U.S. 164 (1972). The complete failure of Respondents to advance a single credible argument for distinguishing those decisions from the present case serves to highlight the clear conflict between the decision below and the controlling precedent of this Court.

A. The Standard of Scrutiny

Respondents' assertion that New Jersey's discriminatory classification requires no more than rational basis review is inconsistent with this Court's holding in *Weber v. Aetna*, 406 U.S. 164 (1972), and other precedent of this Court.

In *Weber* this Court held that the Equal Protection model set forth in *Levy* [which concluded that wrongful death statutes involve the familial relationship of mother and child] was controlling in cases involving state compensation statutes for the wrongful death of a family member, whether the right to recovery was based upon negligence or a workman's compensation theory. *Weber* expressly "reaffirm[ed] here the reasoning which produced that result [striking down the statute as violative of Equal Protection]." 406 U.S. at 172.[1] Noting that a legislative classification must, "at a minimum, . . . bear some rational

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[1] *Levy* stated: "We have been extremely sensitive when it comes to *basic civil rights* (citations omitted)...*the rights here asserted involve the intimate, familial relationship between a child and his own mother.*" 391 U.S. at 71 (emphasis added). For the historical context of *Levy*, *Glona* and *Weber* with respect to the recognition that a parent of an illegitimate child possesses a relationship protected as a fundamental interest by the Due Process Clause, see Pet. p. 19-22.

relationship to a legitimate state purpose," *id.* (citations omitted), this Court emphasized that "when state statutory classifications approach sensitive and fundamental personal rights, this Court exercises a *stricter scrutiny*," id. (citations omitted). This Court went on to reject discrimination in a statutory compensation scheme for the death of a family member because the state interest asserted by Louisiana - in that case the interest in promoting childbirth in marriage - *"is not compelling" Id.* at 173 (emphasis added). *See also id.* at 176 ("the classification is justified by no legitimate state interest, compelling or otherwise").

Weber imposed strict scrutiny because the interests the statute was designed to directly protect were considered fundamental under the Due Process Clause. *Weber* emphasized the nature of the loss to the survivors which was involved, 406 U.S. at 169-174, as did *Levy*, 391 U.S. at 71. These interests were not peripheral to the purpose of the statute or only tangentially involved; rather, their direct protection was the central, if not sole, purpose of the creation of the statutory cause of action. *Weber*, as well as *Levy* and *Glona*, stand for the principle that a state, if it acts to directly protect a fundamental interest of individuals, cannot invidiously exclude any individual from that protection.

Some of *Weber's* reasoning for imposition of strict scrutiny has elements which are unique to Equal Protection analysis of state statutes which voluntarily undertake to directly protect fundamental rights or interests by creating a cause of action in tort. The wrongful death statute is an act of the State which is intended to affect private conduct. In that regard it differs from statutes which provide financial benefits paid by the State itself. However, because the statute represents a state plan to intentionally affect private conduct it impacts the fundamental rights involved in a most direct manner. The primary purpose of the statute is to deter conduct which negatively affects the fundamental interests of both the mother and child. The very existence of the statutory cause of action is a recognition by New Jersey that the statute influences private conduct and positively affects the fundamental rights it seeks to protect. Where deterrence fails the statute compels the wrongdoer, through the power of the State, to compensate for the loss of the relationship in which the victim possesses the interest.

Weber's reasoning is consistent, and possesses elements in common, with other cases of this Court which recognize the

general rules that [1] once a state extends a benefit to those within its borders which implicates fundamental rights, it can justify excluding some individuals from that benefit only if the classification promotes a compelling state interest.[2] and [2] where the state statute which excludes some persons from a benefit which is not itself a "fundamental right", but the act of excluding a particular class of individuals influences private conduct which affects a fundamental right, only a compelling state interest can justify the classification.[3]

In the instance where the state creates a cause of action which protects a fundamental interest, such as the wrongful death portion of the compensation statute in *Weber*, discriminatory denial of the claim to a class has the adverse affect upon the fundamental right by removing the deterrence effect of the statute. Moreover, the denial of benefits rewards and encourages the wrongdoer who destroys the fundamental interest by killing the child. See *Levy*, at 75 ("A law which creates an open season [on the children] gives a windfall to tortfeasors").

The denial of such claims or exclusion from access to Court to redress the grievance of one class of mothers directly denies what the state awards others, namely a judicial judgment for compensation for the relationship lost which is the object of the law's protection. As a result, the state treats in a completely

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[2]See, e.g. *Harper v. Virginia*, 383 U.S. 663 (1966) (the state was not required to create a particular right to vote, but once it did, the state was required to extend the right to all, absent a compelling state interest) see also *Kramer v. Union Free Sch. Dist.*, 395 U.S. 21 (1969); *Oregon v. Mitchell*, 400 U.S. 112, 238 (1970)). For cases involving free speech, see *Carey v. Brown*, 447 U.S. 453 (1980); *Grayned v. City of Rockford*, 408 U.S. 104 (1972)

[3]See, e.g., *Shapiro v. Thompson*, 394 U.S. 618 (1969) (durational residency requirement in order to receive welfare benefits negatively impacts fundamental right to travel). See also *Mem. Hospital v. Maricopa County*, 415 U.S. 250 (1974) and *Dunn v. Blumstein*, 405 U.S. 330, 338-342 (1972). In this latter line of cases, strict scrutiny is imposed because the statute may deter the private act involved in travel. But even if travel is not deterred, strict scrutiny is imposed because the act of travel is "penalized" in the sense that the traveller does not receive a benefit others receive, even though there is no "right" to the benefit. See *Dunn*, at 338-342.

different manner the same fundamental interests of classes similarly situated. Because the wrongdoer can relieve himself of liability by letting the child die in the womb rather than rescue the child, the statute also removes the deterrence of the statute and actually replaces it with an incentive to achieve the very result the statute is designed to deter. This, of course, is of greatest concern in circumstances such as the birth of Kaylyn when the tortfeasor, who is liable for the initial injury to Kaylyn [due to untreated, or improperly treated, fetal distress], must be relied upon to save the life of the same child. The later failure to discharge the duty to save the child's life thus removes the liability for the original injury. And, of course, there is no liability for her wrongful death.

Respondents do not address *Weber's* requirement of a compelling interest, but instead raise two points which are clearly disposed of by *Weber*. Respondents argue that the entitlement to sue for wrongful death is not itself a fundamental right (Opp. p. 11). The Petitioner never asserted that it was. Nor did this Court suggest it was necessary for the claim for wrongful death itself to be "a fundamental right" to impose strict scrutiny. In striking down the statutes in *Levy*, *Glona* and *Weber*, this Court made it clear that although the wrongful death claim is not one to which there is a "right", fundamental or not, the arbitrary exclusion of some individuals who can establish each of the essential elements of the claim clearly violates Equal Protection. *Weber* employed strict scrutiny, not because there was a fundamental right to a wrongful death (or worker's compensation) claim, nor because there was a suspect class, but rather because the statute protected the familial relationship. It "involved" (*Levy*) and "approached" (*Weber*) a fundamental personal right.

Secondly, Respondents argue that the fact that the *Portee* claim is recognized in the context of a stillbirth death somehow cures the equal protection violation of the wrongful death and survival action statutes (Opp. p. 11-12). It should first be noted that not even the Court below made this argument.[4] The notion that allowing *Portee* claims to *all* mothers whose children are tortiously killed

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[4]When the court below addressed what it viewed as the relevance of the *Portee* claim, it was only in reference to a due process violation, that court did not suggest that the *Portee* claim would cure the Equal Protection violation inherent in denying the other two claims.

justifies arbitrarily denying wrongful death and survival claims to *some* mothers whose children are tortiously killed is patently absurd. The fundamental interest protected by the wrongful death claim - the interest in the relationship itself - is not protected by the *Portee* claim at all. Pet. p.10. *Weber* made it clear that even where a statute protects the discriminatory class in its relationship it still violates Equal Protection if the benefits of the statute is denied in some instances. 406 U.S. at 167-168. Here relationship is not protected at all. Furthermore, the *Portee* claim is not reported, officially or anecdotally, to be successfully pursued in the absence of a wrongful death or survival claim. Although she properly pled, and could prove, the negligence of defendants, and its causal relationship to Kaylyn's death, Karen Alexander did not have a *Portee* claim, for instance, which New Jersey recognized as recoverable, because she could not prove the *Portee* type damages to *herself*. [See Pet. App. A162-165].

B. There is No Legitimate State Interest Consistent with *Levy*, *Glona* and *Weber* Which Supports the Discriminatory Classification.

The only "interests" which the Respondents assert to justify New Jersey's invidious discrimination against Karen Alexander and all women similarly situated are [1] the "interest" in imposing a "limit" on the pertinent tort claim [Opp. 13-15]; and [2] a specious assertion that proof of the claim would be "speculative". [Opp. p.16]. The first asserted "interest" is not a legitimate interest at all since it is nothing more than a circular interest in the general process of drawing lines as such, not an interest which justifies that particular line or classification. *Glona*, 391 U.S. at 76 ("The Equal Protection Clause necessarily limits the authority of a state to draw such 'legal' lines as it chooses"). The second asserted "interest" is singularly illogical because the New Jersey Supreme Court has expressly stated that proof of damages in stillbirth deaths are *not speculative, are* permissible, and such proofs are *not the reason* why wrongful death and survival claims are not recoverable in stillbirth cases. Pet. pp.12-13. Furthermore the proofs in a stillbirth case are identical to the proofs in a livebirth case for which the wrongful death and survival claims are recognized. *Giardina v. Bennett*, 545 A.2d 139, 147 (N.J. 1988).

1.

The essential elements of the wrongful death claim include [1] the tortious conduct of the defendant; [2] the causal relationship between the tortious acts and death; [3] that the relationship between claimant and decedent falls among those to which the claim is limited; and [4] damages based upon the pecuniary value of the loss of the relationship and companionship with the loved one. The nature of the cause of action is limited only by these elements of the claim. The discriminatory classification at issue, therefore, is not a limit on a cause of action but rather the creation of a class of mothers who are arbitrarily excluded from recovery despite the fact they can prove all of the elements of the claim within the limits prescribed by the statute. Mrs. Alexander can prove negligence, death, causal relationship between the two, that her relationship is one covered by the statute and that she has the same damages as other mothers who lose their children. She falls within all of the limits on the claim. By disallowing her claim, New Jersey simply carves out an irrational exception to the wrongful death and survival statutes.

Once prenatal injury occurs while a child is still in the womb the child is a person for whose injury or death (or injury and death) a claim can be brought. This is true if the child lives and brings a claim for the injury only or whether the child dies, in which case survival action, wrongful death and *Portee* claims may be brought. Thus the tortious injury to a person in utero always forms the basis of a claim for injury or death to that person. It is therefore clearly irrational for New Jersey's fiction that Kaylyn was not a person to form a "basis" to deny Mrs. Alexander a wrongful death claim.

Respondents really advance the same argument rejected by this Court in *Glona*, that the state is free to withhold legal status from persons by calling them non-persons in the law. Respondents in actuality are simply arguing that the State's interest in drawing the line which defines the discriminatory class is its interest in drawing lines itself. *Glona* and *Levy* emphasized that the State is not free to treat a human being as a non-person, because "the Equal Protection Clause necessarily limits the authority of a state to draw such 'legal' lines as it chooses." *Glona* at 75, 76. Like Louisiana, New Jersey ignores the reality that Karen Alexander lost a daughter as a result of tortious conduct. [See, Pet. p. 14-17].

2.

Respondents assert there is an "interest" of the State which "may" support the discriminatory classification: that proof of damages may be speculative [Opp.p.16]. Few of the Respondents' arguments illustrate the lack of credibility of their position in this case, or expose the weaknesses of the decision of the court below, more than this one. The New Jersey Supreme Court has stated that the proofs associated with stillbirth cases are *not* speculative and expressly rejected this assertion as an "interest" of the State which supports the discriminatory classification. In *Giardina v. Bennett*, 545 A.2d 139 (N.J. 1988) that Court stated:

> "Our reasons for not adopting a more expansive interpretation of the statutory term "person" in this context do not relate to the speculative nature of damages that would occur if fetal death qualified as an actionable wrongful death under the Act. This concern has not discouraged our recognition of the need for recovery in similar cases in recent years. Compare *Green v. Bittner*, 85 N.J. 1 (1980) (discounting speculative nature of pecuniary loss suffered by parents due to the child's death) with *Graf, supra*, 43 N.J. at 310-11..." 545 A.2d at 147.

Not only did the New Jersey Supreme Court, therefore, expressly reject the reason asserted by Respondents as an "interest" to support the classification, but it recounted the fact that *Green v. Bittner* expressly rejected the reasoning of *Graf*, 204 A.2d at 145 when *Green* in 1980 held that the mere proof of a parent-child relationship was sufficient to recover for loss of companionship even where the child was too young to introduce proofs to show that the child was likely to provide services. 424 A.2d 210, 85 N.J. 1, 15-17 (1980).[5]

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[5] "Absent special circumstances, it could be claimed that the mere parent-child relationship does not show that it is more probable than not that such services would have been rendered had the child lived. ...Given the speculative quality of the inferences, it might further be questioned whether one could realistically attach or estimate pecuniary value to such services. Our answer is, even assuming no special circumstances are proven, that...[our Courts] allow damages even though inferences, and the estimate of damages, are based on uncertainties...we are not about to deny this pecuniary element of

Moreover, the proofs in a stillbirth case and a livebirth case where the child dies shortly after birth are identical on both liability and damages. On liability, proofs of the *Portee* claim permitted in stillbirth cases, which includes proof of the causal relationship between tortious act and death, proves the liability portion of the wrongful death and survival action as well. On damages, the circumstances involving proof of companionship is identical had Kaylyn lived a short while outside the womb.

Just as importantly, the only real reason for the classification was the mistake of fact of the legislature when, in the nineteenth century, it believed that the child was not a human being, a separate person in fact, but only a part of the mother. [See Pet. p. 11-14]. Respondents argue that the State intended to exclude Mrs. Alexander from the benefit of the statute because the state intentionally adopted this mistaken nineteenth century understanding for purposes of the wrongful death statute. Respondents cite as evidence that this discrimination was intentional the fact that the legislature knew enough to treat a child in utero as a person in other contexts, e.g. worker's compensation act, and the gift act. (Opp. p. 14.) While this may support a conclusion that the State legislature now knows the truth about the underlying mistaken assumption of fact which the Supreme Court acknowledged and corrected in the context of a common law claim in *Smith v. Brennan*, and has deliberately chosen to retain the discrimination in one context and not another, this does not exonerate the Equal Protection violation. Rather, it only serves to illustrate that the discrimination is intentional. This inconsistency in the treatment of Kaylyn only illustrates the invidiousness of the discrimination, a point made in *Glona* where this Court observed a similar pattern of inconsistency in Louisiana's laws. See *Glona*, 391 U.S. at 74-75.

C. *Levy*, *Glona* and *Weber* are Indistinguishable.

Respondents claim that the reasoning and applicability of *Levy*, *Glona* and *Weber* can be distinguished from this case because [1] New Jersey allows claims for the loss of illegitimate children; and

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prospective companionship and advice for a child because it may be somewhat more conjectural." *Green*, 545 A.2d at __, 85 N.J. at 15-16.

[2] the children Louisiana called non-persons in fact [illegitimates] are persons who have been found to have constitutional rights while Kaylyn Alexander does not. [Opp. p. 18] Neither of these arguments distinguish those cases with respect to Mrs. Alexander's own personal Equal Protection claim.

It is absurd to suggest that because New Jersey has chosen to discriminate against a different class of mothers than the class involved in the Louisiana statutes, that the Equal Protection model and analysis found in *Levy*, *Glona* and *Weber* do not apply. In *Glona* the mother was involved in the illicit conduct targeted by Louisiana's statute. Yet, because of the familial interests protected by the statute, even the state's interest in encouraging childbirth within marriage could not justify excluding that mother from the benefit of the statute. 391 U.S. at 75. The interest of the State did not bear any real relationship to the purpose of the statute as long as the mother actually sustained the loss of her relationship with her child. *Id; Weber*, 406 U.S. at 173-175. Here, New Jersey has *no* interest at all. In fact, the classification is completely irrational and encourages defeat of the purpose of the statute itself.

Likewise the separate legal question of whether Kaylyn possesses any constitutional rights is irrelevant to Karen Alexander's Equal Protection rights. When it comes to her own rights, the only fact which is relevant is whether Mrs. Alexander sustained the loss of a daughter, not the legal question of whether her daughter has a separate Equal Protection claim.

II. THE RESPONDENTS AVOID ANY ATTEMPT TO DEFEND THAT PORTION OF THE LOWER COURT'S OPINION WHICH STATES THAT THE FACT KAYLYN ALEXANDER IS A HUMAN BEING IS IRRELEVANT TO THE LEGAL QUESTION OF WHETHER SHE HAS CONSTITUTIONAL RIGHTS.

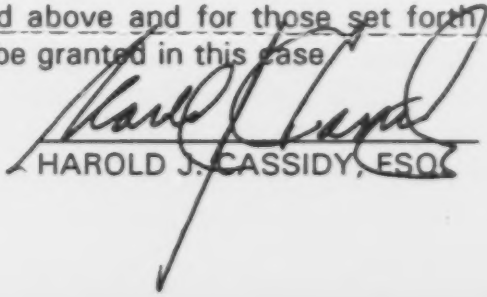
Respondents maintain that - although they cannot bring themselves to refer to her by name - Kaylyn Alexander did not possess Equal Protection rights. They avoid addressing, however, the most essential issues required to reach a legal determination about Kaylyn's rights. Respondents fail to address the legal relevence of the acknowledgement of the Court below that Kaylyn was a complete, separate, unique, irreplaceable human being from conception who experienced pain beginning at eight weeks

gestation. [Pet. p.25-28]. The Court below expressly acknowledged that it was bound by the fact that Kaylyn was a person in fact, 114 F.3d at 1401, but mistakenly interpreted this Court's holding in *Roe v. Wade* to mean there are human beings who have no constitutional rights. 114 F.3d at 1402.

Instead of defending this portion of the opinion of the Court below, respondents prefer to go back in time when *Roe* stated it did not know when the life of a human being began. Respondents rely upon this past lack of knowledge citing to an opinion of a single justice, that "a developing organism that is not yet a 'person' does not have [constitutional rights]." [Opp. p. 9]. This statement is a reiteration that the child was not thought by the *Roe* Court to be a person in fact. *Roe* addressed the entire legal question from the perspective that, at that time, the Court did not know whether the child was an actual human being. The Court thought it was dealing with merely "potential" human life. 410 U.S. at 162-164. The Respondents carefully avoid asserting that the fact the child is a human being is irrelevant to whether she possesses rights. *Roe* never said it was irrelevant. No other opinion of this Court ever held it was irrelevant. This Court's statements have always been to the contrary, that every human being possesses Equal Protection rights. *Levy*, at 70 [See Pet. p.26-28]. *Glona* and *Levy* held that a state is not free to treat a human being (a person in fact) as a non-human being (a person denied "legal status" as person). *Glona*, at 75-76. The Court below, however, has interpreted *Roe* to mean that the fact Kaylyn is a person is irrelevant to the legal question of whether she is a person with rights. That interpretation is not only subject to misuse in other contexts, as observed in the concurring opinion, it is actually abusive in the context of this case where children are killed against the will of the mother with impunity. The Respondent's refusal to defend this portion of the lower court's decision emphasizes the need for this Court to grant certiorari.

CONCLUSION

For the reasons stated above and for those set forth in the Petition certiorari should be granted in this case.



HAROLD J. CASSIDY, ESQ.